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14 UNITED STATES DISTRICT COURT
15 NORTHERN DISTRICT OF CALIFORNIA

16
17 In Re SUBPOENA TO
VeriFone, Inc.

18 Served in related case:

19
20 *Gesten v. Burger King Corp., S.D. Fla. Case*
No. 1:18-cv-20450-CMA

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CV-18 80087M ISC

Misc. Case No. 18-MC-__

NON-PARTY VERIFONE INC.'S
NOTICE OF MOTION AND
MOTION TO QUASH GESTEN'S
SUBPOENA FOR DEPOSITION OF
VERIFONE, INC. AND
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
THEREOF

1 **NOTICE OF MOTION AND MOTION TO QUASH**

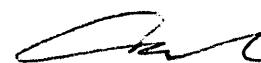
2 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

3 **PLEASE TAKE NOTICE** that on _____ 2018, or as soon thereafter as this matter
4 may be heard, in the above-entitled court, located at 280 South 1st Street, San Jose, CA 95113,
5 5th Floor, VeriFone, Inc. ("Verifone") will, and hereby does, move the Court for an order
6 quashing the Subpoena To Testify At Deposition in a Civil Action served upon it by Ryan
7 Gesten in *Gesten v. Burger King Corp.*, Case No. 1:18-cv-20450-CMA, pending in the United
8 States District Court for the Southern District of Florida.

9 This motion is made on the grounds that the subpoena (i) is invalid because the plaintiff
10 in the underlying litigation lacks standing to pursue his claim; and, alternatively, (ii) fails to
allow a reasonable time to comply.

11 This motion is based upon this Notice of Motion, Motion and Memorandum of Points
12 and Authorities, and Declaration of John G. Papianou in Support thereof, filed concurrently; the
files and records in this case; and any argument advanced at the hearing on this motion.

14 Dated: May 25, 2018

16 

17 _____
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24 VERIFONE, INC.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. NOTICE OF RELATED CASE**

3 The subpoena Verifone seeks to quash was issued in connection with a class action
 4 lawsuit filed by Ryan Gesten (“Gesten”) against Burger King Corporation (“Burger King”)
 5 currently pending in the United States District Court for the Southern District of Florida. *Gesten*
 6 v. *Burger King Corp.*, S.D. Fla. Case No. 1:18-cv-20450-CMA.

7 **II. INTRODUCTION**

8 At issue in this motion is a subpoena issued by Gesten to non-party Verifone on May 18,
 9 2018, demanding Verifone’s deposition testimony in a class action lawsuit Gesten filed against
 10 Burger King in the United States District Court for the Southern District of Florida (the “May
 11 Subpoena”). Verifone respectfully requests that the Court quash it for the following two
 independent reasons.

12 First, Gesten’s May Subpoena is invalid because the named plaintiff in the underlying
 13 action lacks standing to sue. *See Bassett v. ABM Parking Servs., Inc.*, 883 F.3d 776 (9th Cir.
 14 2018) (affirming dismissal of FACTA lawsuit for lack of standing); *Noble v. Nev. Checker Cab*
 15 *Corp.*, No. 16-16573, 2018 WL 1223484 (9th Cir. March 9, 2018) (same). Indeed, the Southern
 16 District of Florida previously dismissed an identical lawsuit filed by Gesten against Burger King
 17 for lack of standing. *Gesten v. Burger King Corp.*, No. 17-22541-Civ-Scola, 2017 WL 4326101,
 18 at *6 (S.D. Fla. Sept. 27, 2017). Gesten’s second lawsuit is no different than his first. Because
 he has no standing, the subpoena is void and must be quashed.

19 Second, the May Subpoena fails to allow for a reasonable time to comply and is therefore
 20 unduly burdensome on non-party Verifone. In particular, the May Subpoena specifies a
 21 deposition date of May 29, 2018—the day after Memorial Day and a mere six business days after
 22 service on Verifone. Gesten had ample time to serve a deposition subpoena on Verifone at an
 earlier date. Verifone should not be punished for Plaintiff’s delay in doing so.

23 **III. FACTUAL AND PROCEDURAL BACKGROUND**

24 a. **The Southern District of Florida Has Dismissed Gesten’s Lawsuit for Lack of**
 25 **Standing**

26 This is not the first lawsuit that Gesten has filed against Burger King. In July 2017,
 27 Gesten filed a virtually identical lawsuit against Burger King in the Southern District of Florida,
 28 alleging that Burger King willfully violated FACTA when it provided him with a customer

1 receipt displaying the first six digits and last four digits of his credit card number.¹ Burger King
 2 subsequently moved to dismiss Gesten's complaint on the basis that Gesten, who maintained
 3 possession of his receipt at all times and suffered no identity theft, failed to allege a concrete
 4 injury and therefore lacked standing to pursue his claim.² On September 27, 2017, the court
 5 granted Burger King's motion to dismiss, finding that he alleged no actual harm or material risk
 6 of harm. *Gesten I*, 2017 WL 4326101, at *6.

7 **b. Gesten's Second Lawsuit against Burger King**

8 Rather than appealing the court's decision, Gesten re-filed his complaint in Florida state
 9 court.³ Gesten served the complaint on Burger King on January 15, 2018, approximately a week
 10 after Burger King succeeded in obtaining dismissal of a second FACTA lawsuit against it in the
 11 Southern District of Florida for lack of standing. *Tarr v. Burger King*, No. 17-23776-CIV-
 12 Moreno, 2018 WL 318477, at *4 (S.D. Fla. Jan. 5, 2018). That second FACTA case is currently
 13 on appeal before the Eleventh Circuit.⁴

14 In light of that appeal, Burger King removed Gesten's state court complaint to federal
 15 court while simultaneously seeking a stay of the action pending the Eleventh Circuit's resolution
 16 of the *Tarr* appeal.⁵ The court subsequently denied the stay without addressing whether Gesten,
 17 in fact, had standing to bring his claim. *Gesten II*, 2018 WL 1111061, at *1-2 (S.D. Fla. Feb. 22,
 18 2018). And because Burger King did not file a motion to dismiss, the parties proceeded to
 19 discovery.

20 ¹ See Compl. ¶¶ 1, 31-33, *Gesten v. Burger King Corp.*, No. 1:17-cv-22541-RNS, 2017 WL
 21 4368668 (S.D. Fla. July 7, 2017) (Dkt. 1) ("*Gesten I*"). FACTA provides that "no person that
 22 accepts credit cards or debit cards for the transaction of business shall print more than the last 5
 23 digits of the card number or the expiration date upon any receipt provided to the cardholder at
 24 the point of the sale or transaction." 15 U.S.C. § 1681c(g)(1).

25 ² Burger King's Motion to Dismiss, *Gesten I* (Dkt. 12).

26 ³ Notice of Removal, *Gesten v. Burger King Corp.*, Case No. 1:18-cv-20450-CMA (S.D. Fla.
 27 Feb. 2, 2018) (Dkt. 1) ("*Gesten II*").

28 ⁴ See *Tarr v. Burger King Corp.*, Case No. 18-10279. The *Tarr* appeal is currently stayed
 29 pending the Eleventh Circuit's decision in *Price v. Godiva Chocolatier, Inc.* (Case No. 16-
 30 16486), another FACTA appeal presenting precisely the same Article III standing issue. The
 31 *Godiva* appeal is fully briefed and oral argument was heard on January 12, 2016.

⁵ *Gesten II* Notice of Removal & Ex. 4 (Motion to Stay) (Dkt. 1 & 1-5).

1 **c. The Subpoenas Gesten Served on Verifone**

2 Gesten served its first subpoena on Verifone on April 16, 2018 (the “April Subpoena”).
 3 The April Subpoena demanded that Verifone produce documents relating to six topics over a ten-
 4 month period by May 1, 2018, just eleven business days after Verifone was served. Papianou
 5 Decl., Exhibit A. Verifone promptly took steps to collect documents responsive to the subpoena
 6 and ultimately made a production to Gesten on May 24, 2018, two days after the parties filed a
 7 stipulated protective order in the underlying action.⁶ Papianou Decl. ¶ 4.

8 In the meantime, on May 18, 2018, Gesten served the instant subpoena on Verifone
 9 demanding its deposition testimony in a mere eleven days’ time. Marton Decl., Ex. B. Verifone
 10 objected as to lack of standing and also to the deposition topics covered by the subpoena and the
 11 time required for compliance. After Gesten and Verifone met and conferred, Gesten agreed to
 12 narrow the scope of the deposition and to reschedule it at a later date. Papianou Decl., Ex. C.
 13 However, Gesten refused to delay the deposition beyond June 8, 2018. Papianou Decl. ¶ 8.

14 **IV. ARGUMENT**

15 **a. This Is the Appropriate Court To Hear This Motion**

16 Federal Rule of Civil Procedure 45 provides that the jurisdiction to bring a motion to
 17 quash is “the court for the district where compliance is required.” Fed. R. Civ. P. R. 45(d)(3)(A).
 18 The May Subpoena specifies San Jose, California—the location of Verifone’s headquarters—as
 19 the place of compliance. Papianou Decl., Ex. B. As such, this Court is the appropriate
 20 jurisdiction for Verifone’s motion to quash.

21 **b. Verifone Has Standing To Challenge Subject Matter Jurisdiction**

22 Verifone, as a subpoenaed non-party, has standing to challenge the validity of the May
 23 Subpoena for lack of subject matter jurisdiction.

24 As the Supreme Court observed in *U.S. Catholic Conf. v. Abortion Mobilization, Inc.*,
 25 487 U.S. 72, 76 (1988), “the subpoena power of a court cannot be more extensive than its
 26 jurisdiction.” Accordingly, in *Catholic Conference*, the Supreme Court held that a non-party
 27 subject to a subpoena may attack a contempt order for failure to comply with the subpoena by
 28 contesting the court’s subject matter jurisdiction. 487 U.S. at 76. “Courts in the wake of

26 ⁶ *Gesten II* Stipulation and Proposed Protective Order (Dkt. 36-1).

1 *Catholic Conference* have expanded this standing doctrine to allow for direct attacks on subject
 2 matter jurisdiction before the issuance of a contempt citation.” *Mitchell v. Hood*, 2015 WL
 3 7854461 (E.D. La. Dec. 2., 2015) (citing *Dunham v. Coffeeville Resources*, 2007 WL 2403689,
 4 at *1 (D. Kan. 2007) (“[A] non-party who is served with a subpoena by a federal court can, as a
 5 part of any objection to the subpoena, raise the court’s lack of subject matter jurisdiction, and if
 6 the court does lack subject matter jurisdiction, then the subpoena is void.”); *Billings v. Aeropres*
 7 *Corp.*, 522 F. Supp. 2d 1121, 1130 (E.D. Ark. 2007) (“If a court does not have subject matter
 8 jurisdiction, it cannot issue subpoenas, even to non-party witnesses.”); *Hous. Bus. Journal v.*
Office of the Comptroller of the Currency, 86 F.3d 1208, 1213 (D.D.C. 1996)).

9 Indeed, at least one Northern District of California court has granted a motion to quash
 10 for lack of subject matter jurisdiction even when the underlying action was pending before
 11 another district court. *See USA Tech., Inc. v. Doe*, 713 F. Supp. 2d 901 (N.D. Cal. 2010)
 12 (“Though the ultimate question of federal jurisdiction will be decided by the [E.D. Pa.], the
 13 apparent deficiency of [plaintiff’s] claim, which is the sole basis for federal jurisdiction in this
 14 case, is an appropriate basis to grant the Motion to Quash”). The Court should do the same here.

15 c. **Gesten’s May Subpoena Should Be Quashed Because He Lacks Standing To**
Bring the Underlying Action

16 Gesten’s May Subpoena should be quashed for lack of subject matter jurisdiction because
 17 he lacks standing to sue.

18 To satisfy Article III’s injury-in-fact requirement, the “plaintiff must show that he or she
 19 suffered ‘an invasion of a legally protected interest’ that is ‘concrete and particularized’ and
 20 ‘actual or imminent, not conjectural or hypothetical.’” *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540,
 21 1547 (2016) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). A “concrete”
 22 injury is one that is “real” and “actually exists.” *Spokeo*, 136 S. Ct. at 1548. Where, as here, a
 23 plaintiff alleges the mere risk of harm, the court must determine whether the plaintiff’s
 24 allegations “entail a degree of risk sufficient to meet the concreteness requirement.” *Id.* at 1550.
 25 A plaintiff must establish, at a minimum, a “*material* risk of harm.” *Id.* (emphasis added);
 26 *Robins v. Spokeo, Inc.*, 867 F.3d 1108, 1113 (9th Cir. 2017).

27 Gesten’s sole claim against Burger King is that it provided him with a customer receipt
 28 that displayed more than the last five digits of his credit card account number in violation of
 FACTA. *Gesten II* Compl. ¶¶ 63-70. Gesten has not alleged that the receipts caused him to

1 suffer identity theft or any other actual harm. Rather, the only harm he alleges is the “heightened
 2 risk of identity theft.” *Gesten II* Compl. ¶¶ 1, 69. But even that allegation falls flat, as Gesten
 3 does not allege that his receipt has ever left his possession. As such, the risk he alleges is
 4 entirely speculative and falls far short of satisfying Article III’s injury-in-fact requirement.

5 The Ninth Circuit has recently affirmed the dismissal of FACTA lawsuits containing
 6 nearly identical allegations. *Bassett*, 883 F.3d at 777; *Noble*, 2018 WL 1223484, at *1-2. Like
 7 Gesten, in both *Bassett* and *Noble*, the plaintiffs had alleged that the defendants provided them
 8 with receipts that displayed credit card account information prohibited by FACTA. *Bassett*, 883
 9 F.3d at 778; *Noble*, 2018 WL 1223484, at *1. In both cases, the plaintiffs claimed they had
 10 standing because the receipts exposed them to an increased risk of identity theft. *Bassett*, 883
 11 F.3d at 778; *Noble*, 2018 WL 1223484, at *1. The Ninth Circuit rejected the argument,
 12 concluding that plaintiffs’ alleged risk was hypothetical given that there was no allegation that
 13 anyone else had ever possessed the receipts. *Bassett*, 883 F.3d at 783 (“when this receipt fell
 14 into Bassett’s hands in a parking garage and no identity thief was there to snatch it, it did not
 15 make an injury.”); *Noble*, 2018 WL 1223484, at *1-2 (“As in *Bassett*, Appellants here did not
 16 allege that anyone else had received or would receive a copy of their credit card
 17 receipts...*Bassett*’s reasoning controls the issue in this case, and we are bound by it.”).

18 In addition, federal courts within the Southern District of Florida have recently dismissed
 19 two virtually identical FACTA suits against Burger King for lack of standing—including a
 20 previous suit filed by Gesten himself. *Gesten I*, 2017 WL 4326101 (S.D. Fla. Sept. 27, 2017);
 21 *Tarr*, 2018 WL 318477 (S.D. Fla. Jan. 5, 2018).⁷

22 ⁷ A host of other courts—including the Second and Seventh Circuits and at least a dozen district
 23 courts nationwide—have likewise dismissed FACTA claims based on lack of standing. See, e.g.,
Katz v. Donna Karan Co., LLC, 872 F.3d 114, 119-21 (2d Cir. 2017); *Meyers v. Nicolet Rest. of*
De Pere, LLC, 843 F.3d 724, 727-29 (7th Cir. 2016); *Stelmachers v. Verifone Sys., Inc.*, No.
 24 5:14-cv-04912-EDJ, 2017 WL 3968871, at *4 (N.D. Cal. Sept. 7, 2017); *Kamal v. J. Crew Grp.,*
Inc., No. 2:15-0190, 2017 WL 2587617, at *3-5 (D.N.J. June 14, 2017); *Hendrick v. Aramark*
Corp., 263 F. Supp. 3d 514, 520-21 (E.D. Pa. 2017); *Everett v. Memphis Light Gas & Water Div.*,
 25 No. 16-cv-2810, 2017 WL 1830165, at *2-4 (W.D. Tenn. Apr. 18, 2017); *Paci v. Costco*
Wholesale Corp., No. 16-cv-0094, 2017 WL 1196918, at *2-3 (N.D. Ill. Mar. 30, 2017); *Lindner*
 26 *v. Roti Rests., LLC*, No. 17-cv-935, 2017 WL 3130755, at *2-3 (N.D. Ill. July 24, 2017).

1 Gesten's second lawsuit is no different from his first. Because he has no standing to
 2 pursue his claim, his subpoena is invalid and should be quashed.

3 **d. Gesten's May Subpoena Should Alternatively Be Quashed Because It Fails to**
 Allow a Reasonable Time to Comply

4 Even if the Court were to find standing here (which there is not), it should alternatively
 5 quash Gesten's May Subpoena because it fails to allow a reasonable time to comply.

6 Federal Rule of Civil Procedure 45 provides, in pertinent part, that "[o]n timely motion,
 7 the court for the district where compliance is required must quash or modify a subpoena that: (i)
 8 fails to allow a reasonable time to comply." Fed. R. Civ. P. 45(d)(3)(A)(i). Courts within the
 9 Northern District of California have held that fewer than ten days to comply with a subpoena is
 10 presumptively unreasonable. *Free Stream Media Corp. v. Alphonso Inc.*, Case No. 17-cv-02107,
 11 2017 WL 6209309, at *4 (N.D. Cal. Dec. 8, 2017).

12 Here, the May Subpoena demanded compliance within a mere eleven calendar days from
 13 service. This intervening period included not only two weekends, but also a federal holiday.
 14 While Gesten agreed to schedule the deposition for a later date, he insisted that it take place
 15 before June 8, 2018. Gesten's urgency in commanding this testimony on such short notice is
 16 apparently the result of the impending June 8, 2018 deadline for the completion of class
 17 discovery in the underlying action.⁸ But there is no reason Gesten could not have served this
 18 subpoena on Verifone at the same time as his April Subpoena for the production of documents.
 19 Instead, Gesten delayed more than a month and then served it after he obtained a last-minute
 20 extension of the original deadline for class discovery.⁹ Gesten should not be rewarded for his
 21 delay in issuing the subpoena, nor should non-party Verifone be punished for Gesten's
 22 procrastination. Further, quashing the subpoena is likely to cause little if any prejudice to Gesten
 23 because most, if not all, of Gesten's deposition topics are wholly irrelevant to class certification.
 24 Papianou Decl., Ex. C (narrowed deposition topics).

25

⁸ Papianou Decl., Ex. E (*Gesten II* May 15, 2018 Order (Dkt. 32)).

26 ⁹ Papianou Decl., Ex. D (*Gesten II* Mar. 14, 2018 Order (Dkt. 18) (setting May 14, 2018 deadline
 27 for class discovery)); May 11, 2018 Motion To Reset Class Discovery Deadline (Dkt. 28);
 28 Papianou Decl., Ex. E (May 15, 2018 Order (Dkt. 32) (extending deadline for class discovery
 until June 8, 2018)).

Because the May Subpoena fails to provide a reasonable time for compliance, it should be quashed.

V. CONCLUSION

For the reasons set forth above, Verifone respectfully requests that the Court quash Gosten's May Subpoena.



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